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PROJECT OF A LAW FOR DETERMINING THE LEGAL RELATIONS OF THE INSANE.[1]

In all countries making any pretensions to freedom, the liberty of the citizen is protected by constitutional provisions, and the statute book abounds with checks and safeguards against their infringement. Neither life nor property have been the objects of such watchful jealousy, as the liberty of the person, and one of the fundamental principles of every free government is, that no person shall be deprived of his liberty, without a trial by his peers. It is somewhat remarkable, therefore, that in Anglo-Saxon communities the effect of insanity on this great privilege has not been regulated by clear and definite provisions, and that their jurisprudence presents only a series of conflicting and unsatisfactory decisions respecting it. The progress of knowledge has been attended by little if any improvement here, and on the simple question how far insanity warrants the control of a person's liberty, it is probable that the opinions of legislators and jurists are as far from unanimity as ever. Considering the frequency of this disease, and of the

[1] The above paper was read to the "Association of Medical Superintendents of American Institutions for the Insane" at its late convention in this city, by Dr. Ray of Providence, R. I., and as it is a matter of no less interest to the legal than the medical profession, we are induced to lay it before our readers. — Ed. Monthly Law Rep.

necessity of personal restraint for securing the welfare of the patient, and also, it may be, the safety of society, this condition of the law is fruitful of evil to all parties concerned. Justice, domestic peace, the common rights of humanity, all require that it should be replaced by one more definite and more easy of application to the circumstances of modern times.

It may seem at first blush, perhaps, that we are laying an undue stress on a matter which actually can enter but little into the ordinary relations of man with man, but those who are practically conversant with the subject estimate very differently the magnitude of the evil and the need of an effectual remedy. How long is it since the delusions of a monomaniac were proclaimed from under the gibbet? How long is it since we were grieved and incensed by the sight of the holiest ties snapped asunder, and an act of neighborly kindness and regard made the occasion of inflaming the passions of the populace, and visited in a court of law with the penal consequences of crime. It may be doubted if a year has passed during the last twenty-five, to go back no farther, that has not witnessed, either in this country or Great Britain, or perhaps in both, some legal decision or verdict affecting the person or property of the insane, not in accordance with the dictates of humanity, or of medical science. Such an extraordinary case is entitled to our most serious and immediate consideration, and if any man or body of men may venture to propose an appropriate remedy for the evil, it certainly is an association like this, whose members have abundant occasion to witness the evil, and whose studies are most likely to suggest the remedy. I therefore submit to your examination, the project of a general law for regulating the legal relations of the insane. The materials have been derived from three sources; first, those principles of the common law which I deem to be correct, but which, to prevent misconstruction or dispute, need a clear and authoritative expression; secondly, such provisions as the statute law of the country may furnish worthy of general adoption; and thirdly, such addi-

tional provisions, as, though found in no code of laws, are the legitimate result of the clearer light of modern science and the stronger claims of modern humanity. I have endeavored to accomplish the proposed objects, by introducing no novelties not absolutely necessary, and by deviating as little as possible from those modes of procedure with which our communities are most familiar.

Among the legal relations of the insane, the most prominent, and perhaps the most important, is that connected with their seclusion for the purpose of cure or custody. It will be regarded hereafter as a curious fact, that while the most of our insane hospitals have been created and more or less maintained by the State, the confinement of the insane is regulated in most, if not all the States, by no statute law whatever. These institutions may, for their own convenience or protection, have adopted rules for the admission of patients, but the legislature has placed no safeguards against the improper exercise of their power. True, a person unjustly confined may obtain his liberty by means of a writ of habeas corpus, and seek redress for false imprisonment, in an action at law. But the evil in question would be better met by salutary measures of prevention, than by such remedies as these. To interfere with the liberty of another is so delicate and responsible a matter, that justice to all parties requires that their respective rights should be authoritatively defined. No individual's liberty should depend entirely on the will of another individual, nor should a friend or neighbor, for the performance of a friendly office, be persecuted with law-suits and punished with vindictive damages.

The seclusion of a person from his family and customary pursuits, on account of insanity, should be regulated by provisions having reference to the varying circumstances that may arise, and applicable with a suitable degree of ease and quietness. A uniform mode of proceeding would secure no advantages that would not be counterbalanced, either by a degree of publicity and delay exceedingly painful in a majority of cases, while totally unnecessary and

uncalled for, or by a want of that impartial inquisition which, in a few cases, is necessary to remove every suspicion of unfair dealing. It seems better to suit the provision to the nature of the case, and on this principle I have acted in constructing the proposed law.

When a person is struck down by disease, and is no longer capable of caring for himself, he is completely dependent on those around him — his family, his relatives, his neighbors, and even the passing stranger. To this appeal for sympathy and care, the ties of kindred, the holiest instincts of our nature, a sense of duty, a decent regard for the opinion of mankind, each or all prompt a favorable answer, and the sacred ministry thus exercised is instinctively regarded with feelings of respect and honor. It does not appear, at first sight at least, that there is any difference in the relations of the parties, when the disease is mental, instead of bodily. The essential conditions of the case are the same. The individual, if not utterly helpless, is incapable of judging what is best for himself, and needs appropriate attendance and medical treatment. Here then, as in case of bodily disease, the duty of making such provisions as the welfare of the patient may require, naturally falls upon those immediately around him or near him. Nature prompts it, the common sentiment of mankind expects it, in most cases all parties are ultimately satisfied with it, and the legislature should legalize it.

The doctrine of the common law on this point has not been interpreted with the uniformity which the importance of the subject requires. Not long since Chief Justice Shaw of this State laid down the broad principle, that the friends of an insane person are authorized in confining him in a hospital, by "the great law of humanity."[1] On the other hand, within the past year, the Lord Chief Baron of the English Court of Exchequer incidentally remarked, that insane persons could not be legally held in confinement unless dangerous to themselves or to others.[2] In this opinion

[1] Law Reporter, Vol. viii. p. 122.
[2] Nottidge v. Ripley, Law Reporter, N. S. Vol. ii. p. 277.

he was undoubtedly wrong, because the legislature had granted the power (8 & 9 Victoria, c. 100), but it indicates his interpretation of the common law on the subject. If therefore the friends of the insane are to enjoy the privilege of providing for them in such a manner as they may deem most suitable for their welfare, there seems to be a manifest propriety in securing it by a legislative act. The provision which, in accordance with these views I have adopted, insures the indispensable requisites of a great majority of cases, — dispatch, domestic privacy, and those natural rights that flow from the family relation, — and, considered in all its aspects, is both wise and humane. That the power might sometimes be abused, is not denied, but such a result would be an exception to the general rule, and would be effectually remedied by the provisions hereafter mentioned. For obvious reasons we would give the same power to the guardian over his ward, and to the proper municipal authorities over their paupers.

A very different provision is required for a smaller class of cases, in order to secure, in the fullest degree, the rights of persons and the confidence of the public. We all know that insanity does not always derange every operation of the mind, and deprive the patient of every attribute of a rational being. Under certain circumstances his conduct and conversation are marked by ordinary propriety and discretion, and to those who regard him superficially, he appears to be governed by the ordinary feelings and motives of men. At the worst, he may be supposed to be only a little eccentric, or to give way too readily to passion and impulse. To those, however, whose relations towards him place them immediately under his control, and whose presence furnishes no check upon the manifestations of his character, he appears very differently. They witness a degree of mental excitement and restlessness, an extravagance in his prospects and plans, a readiness to embark in new and hazardous speculations, an indulgence in habits of living beyond his means or unsuitable to his condition, an impatience at the slightest show of opposition or restraint,

unfounded suspicions and jealousies, and the most arbitrary and tyrannical conduct in his family, all which traits are foreign to his natural character and perhaps of recent origin. He at last evinces so little control over his passions, or is so completely possessed by his morbid fancies, that the peace and comfort of those in any way dependent upon him, are destroyed, and they are in momentary fear of personal violence. Besides this, he may be squandering his estate in a series of ruinous undertakings, and rapidly bringing his family to beggary, or plunging into unlawful indulgences that fill them with shame and sorrow. Now when such a person is placed by his friends in a hospital, the discipline of which is necessary, not only to secure the safety of others, but to restore him to his natural and healthy condition of mind, he declares that he is the victim of an iniquitous cabal, and so plausible and ingenious are his representations, that the most intelligent and cautious are sometimes led to suspect that he has not been fairly dealt with. Wearied by his incessant importunities, and doubtful, perhaps, of the propriety of his confinement, he is finally discharged by the directors of the institution, to renew the same course of ruinous enterprises and domestic tyranny, with the addition, it may be, of a lawsuit against his friends for false imprisonment. Even though he fail by these manœuvres to shorten the period of his confinement before it has produced any salutary effects, his mind is kept in a state of agitation and wrath that might, in some degree, have been avoided, if the measure had come from a different quarter, and with some of the formalities of a legal procedure.

The condition of a family whose head is laboring under the form of insanity described above, is sufficiently painful and embarrassing, without imposing upon it the necessity of adopting the only appropriate measure, unaided by any of the sanctions and helps of law. To provoke the wrath of such a person by what he would consider the most flagrant indignity and outrage, would be too fearful a thing to be ventured upon until patience had been tried to the

utmost limit of endurance, or some overt act of violence called for immediate action. Neither is it a small thing to provoke the criticism of the public by taking a step of this importance, the necessity of which may not be unequivocally obvious to the world. In such cases the public is severe in its judgments, and not particularly careful to weigh the parties in an even balance.

In the same category, too, we would place those persons who are insane enough to require confinement, but have no relatives or friends with sufficient interest in their welfare to induce them to assume so unpleasant and responsible a duty, as that of placing them in confinement.

After due consideration of the various means that might be adopted for determining the question of seclusion, in regard to the cases above mentioned, I can think of none better than that of a commission, so constituted that its decisions shall command the respect and confidence of the community. In England the Lord Chancellor appoints a committee of five persons, one of them, a barrister at law, with whom is associated a jury of twelve men summoned by the sheriff. The jury hear the evidence and render their verdict to the commissioners who sit as a court, by whom the proceedings are reported to the chancellor. This certainly is too cumbersome and expensive a proceeding for this country, while it is quite probable that the rights of individuals would be as well protected by a more summary process. I would propose a commission of not less than four nor more than six persons, one of them a lawyer and another a physician, for the purpose of giving a suitable direction to the inquisition, who should have the party brought before them, hear the testimony, and render a decision accordingly. Of course they should have the power of ordering him to be held in custody pending the proceedings. The authority appointing the commission should be as accessible as possible, to insure the necessary dispatch, and might be lodged with the Judges of the law courts, and also with Judges of probate where these functionaries are at all distinguished from the average run of men by

superior knowledge and respectability. The application should be made in writing by some friend or relative, and should present the grounds on which the allegation of insanity is to be established. The success of this proceeding would very much depend on the character of the individuals composing the commission, and no act of the legislature could regulate that exactly. It is probable, however, that the importance would be felt of intrusting so delicate and responsible a duty to men, whose intelligence and virtues have given them a merited weight of character in the public estimation.

There is still another class of the insane for whose committal a mode of procedure is required, different from both of those already mentioned. I mean those whose disorder renders them dangerous to the community, and who have no friends to take them in charge, and provide for them according as their necessities may require. Most, if not all the New-England States, and perhaps others, have a statute which gives to a magistrate the power of committing to some place of confinement, "persons furiously mad and dangerous to be at large." This provision I propose to retain. Indeed, there seems to be no other way by which this class of persons can receive the attentions that common feelings of humanity and a regard for public order would dictate. As they are, for the most part, destitute and friendless, and become a charge to the community where they are arrested, there can be no inducement to seek their confinement unjustly. It would not be impossible, certainly, for wicked and cunning men to make the statute an instrument of great injustice; but the objection arising from such a contingency may be obviated by the fact, that if the case present any suspicious circumstances, the magistrate may decline to take cognizance thereof, and refer the parties to the provisions of the third section. And even at the worst, the fifth section would furnish a remedy for any possible abuse.

Having thus provided for the restraint of the different classes of persons who may require it, the next step in our

projected law will be to provide for their restoration to liberty. For the most part, the latter measure, like the original restraint, should remain in the hands of the family or friends. The same authority, also, which commits persons "furiously mad and dangerous to be at large," should have the power of discharging them, when satisfied that the original objects of their confinement will be properly cared for. It is proper, too, that those who have guarantied the payment of the expenses of an insane person in a place of confinement, should have the power of removing him, if that is requisite in order to close their liabilities. Reasons may occur that would render it as expedient to withdraw from such an obligation, as it might have been to assume it originally, and if, by the conditions of the obligation, the patient must be removed before it can be discharged, then most clearly the surety should have that power.

There now remains but one more class whose discharge from confinement we have to consider, — those who claim their liberty on the ground of being unjustly confined. The injustice may consist in being confined without having ever been insane, or in the confinement being continued after recovery from the disorder. We can conceive of no better mode of meeting such cases, than by a process very similar to that by which those are committed whose friends do not choose to assume the responsibility. There would be a convenience in making the trustees, directors, or by whatever name that body may be called which has the general supervision of the hospital, this committee, as they could discharge the duty quietly and cheaply, with the peculiar advantage of having often observed the party in question and heard his statements from his own lips. But their official connection with the institution might be thought to bias their opinions, and therefore there seems to be a propriety in forming the commission of persons having no previous knowledge of the parties. It should be an indispensable condition that they should have an interview with the patient, but it is not necessary that it should be attended with any formalities, or that he should be aware of its

object. The proceeding is in the nature of an inquisition, not a trial by jury, and hence the commission may not be bound by any formal rules in pursuing their object. Indeed, the great advantage of this method over a judicial investigation procured by a writ of habeas corpus, is, that it is not necessarily attended with a degree of formality and publicity calculated to excite injuriously the mind of an insane person, and also to produce a mischievous effect upon the minds of other patients in the same establishment.

It often happens, that insane persons are attacked with bodily disease, when their friends are desirous of taking them home, and contributing whatever may be in their power to the solace of their declining days. The character of their disorder also often changes, so that they can be safely managed at their own homes; and sometimes there may be reasons for merely changing the place of confinement. In all these contingencies, the grounds on which the discharge of the patient is sought for, are so reasonable, that the order of a Judge should be sufficient without the interference of a commission.

The above provisions, we apprehend, will meet every contingency incident to the confinement, or discharge therefrom, of the insane. They possess the necessary requisites of dispatch, convenience, cheapness, and regard to private feelings. By suiting the provision to the particular emergency, we avoid the insuperable objections that would lie against any single provision intended for application to all classes of cases. By far the larger class requires no legal procedure at all, and is better left to the management of the family or friends. To subject them to any legal formalities beyond a compliance with a few simple rules, would be to inflict needless pain, and thus produce a certain evil in order to avoid a contingent one. The much smaller class, which requires some judicial investigation, is provided for by a mode of procedure, familiar to our practices, accessible, cheap, and well calculated to satisfy the public mind. The commission, let it be observed, is its only essential feature. The manner in which

it shall be constituted, and the authority from which it shall emanate, are subordinate, though important points, which must or ought to vary with the circumstances of each particular community. To insure the successful working of the system, the appointment of the commission should be conferred upon functionaries having some practical acquaintance with law proceedings, and sufficiently cultivated and enlightened to be above the influence of vulgar prejudices. On this account I have selected for the purpose, the Justices of the law courts, and perhaps those of the probate courts, and in sparsely populated parts of our country, the public convenience might be served by adding to them the sheriff of the county. In most respects, it would be decidedly better if the duties of these commissions were performed by a single permanent board appointed by the government. The members of such a board would naturally make themselves acquainted, by all the means in their power, with the subjects of inquiry that would come before them, and frequent practice would give that familiarity with their duty that would enable them to avoid mistake, and inspire confidence in their decisions. The only conceivable objection to the plan would be, the large amount of travelling expenses to which it would lead, especially in large States, and this would be sufficient, probably, to outweigh its acknowledged advantages.

In order to prevent any infringement of the laws respecting the confinement of the insane, the first step would be, to render it a penal offence for the directors or superintendents of hospitals to receive patients, except in strict conformity to the laws. In respect to persons admitted under the first section, a certificate of insanity from one or more physicians should be required, as well as a written request for admission from some relative or friend. Beyond this I do not know that any safeguard would be practicable or necessary, and, considering the provisions that furnish a remedy against any possible abuse, I see not how any fault can be reasonably found with it.

In settling the legal responsibilities of the insane for

criminal acts, provisions more definite and precise than any hitherto adopted, are demanded by the humanity and science of the age. I scarcely need remind you, that, by the English common law, insanity does not necessarily annul responsibility for crime. It supposes, that there is a form of the disease in which no essential element of responsibility is wanting. Of late years, however, under the influence of modern enlightenment, courts have often adopted a milder construction of the law, and thus have procured a sentence of protection rather than punishment. The French law recognizes no distinction of form or degree of insanity, but simply says that no person can be punished for a criminal offence, who was insane when it was committed. In the most of our States, the courts are governed by the common law, while in a few, the provisions of the French code have been enacted by the legislature. Such is the case in New York, where, however, it has not prevented the courts from making the same distinctions as the English courts, and they have formally declared [1] that the statute was not intended to abrogate, or even qualify, the common law rule. This is not a suitable occasion for examining a subject which has been abundantly discussed elsewhere.[2] For the present purpose it is sufficient to say, that insanity affects the intellectual and moral perceptions. To what extent exactly it has this effect, is a fact beyond the reach of our penetration, and therefore we should not be justified in saying, that in every instance it necessarily destroys every element of moral responsibility. But it is no less true, that we *know* nothing on the subject, and consequently it would be presumptuous to make a distinction between the insanity that does, and that which does not, destroy responsibility. The only safe course is, to suppose — what is no doubt actually so in the great majority of cases — that the disease destroys, perverts, or changes in some way, the power of truly perceiving the moral character of certain acts, or of resisting the temptations to

[1] Will. Freeman in Error *v.* The People, Law Reporter, Vol. x. p. 12.
[2] Law Reporter, Vol. x. p. 106.

crime. If, however, it can be proved that the criminal act was not the offspring of insanity, then let the party suffer its legal consequences.

By the common law, which is also followed in this country, a person while insane cannot be brought to trial for a criminal offence; and this question is tried by the same jury which is to try the main issue, and by the same mode of procedure. A more unsuitable question for a jury trial, it would not be easy to imagine. Although a matter of fact, the existence of insanity in a given case, must be determined, not merely by the evidence of the senses, but by an exercise of judgment enlightened by general experience, and by a particular examination of the case in hand. A court-room is no place for such an examination, because it does not and cannot afford the requisite facilities, and at present the law provides no other. If the accused has friends, sufficiently interested in his fate to prevail upon experts to visit him in jail previous to trial, and examine him, for the purpose of ascertaining his mental condition, even then they might fail to discern what would finally appear under the unceasing, but quiet and unobtrusive observation of a hospital. For this reason I would have these cases referred, in the first instance, to a commission, whose report should determine the Court, either to bring the accused to trial, or send him to a hospital for the sake of an efficient and satisfactory observation.

The public convenience, as well as private justice, would be equally served by authorizing Courts to send to a hospital for the same purpose, any person under arrest for crime, when satisfied, by the report of a commission, that there are reasonable grounds for suspecting the existence of insanity. A provision similar to this has been recently enacted by the legislature of Maine.

In England, persons acquitted in a criminal trial, on the ground of insanity, are immediately placed in confinement, in accordance with a statute to that effect. A similar practice prevails in this country to some extent, but I am not aware that it is always by provision of some statute on

the subject. Indeed, it looks, at first sight, like an unconstitutional exercise of power, because it rests upon the mere conjecture, that the insanity which led to the criminal offence, continues to the end of the trial. The fact may or may not be so; it is not customary to offer any evidence respecting it. It is, therefore, for the very purpose of ascertaining whether the prisoner has or has not recovered from a mental disorder which, a few weeks or months previously, impelled him to acts of violence, that he should be placed in a hospital. I am not prepared, however, to sanction the English practice of never entertaining the question of their recovery, and consequently, of never discharging them from confinement. I would therefore apply to them the same provisions that are made for others confined in hospitals by due process of law.

The only change I would propose in the present method of placing the insane under guardianship, is, to render their presence at the hearing of the case, or their summons thereto, not unconditional, but contingent on the circumstances peculiar to each individual. The summons might be issued in all cases; but if complying with it would be likely to interfere with the process of recovery, it ought not to be enforced, and the certificate of a physician to this effect, should be deemed a sufficient excuse.

In regard to the civil consequences of the acts of the insane, there is but little if any statute law in this country or Great Britain, nor is the common law well settled upon every point. In the matter of *tort* and *trespass*, as they are called, it is an undisputed principle, that the insane are liable for damages in a civil suit. Fault has been found with it, more probably from the hardship of its operation in particular cases, than any real injustice in the general principle. The subject is encumbered, no doubt, with practical difficulties that cannot be easily overcome by any kind of legislation. They can only be met more or less completely, by the discretion and honesty of courts and juries. There seems to be no way of avoiding the general conclusion, that, inasmuch as the ultimate conse-

quences of an insane person's acts must fall either upon himself or the aggrieved party, it ought in justice to be the former. He may be innocent of any intention to do wrong, abstractly considered; he may be unconscious even of having done any thing; yet the injury is no less real, while the aggrieved party is equally innocent of intention or consciousness of wrong. It may be objected, perhaps, to this view of the matter, that such acts should be regarded as a visitation of Providence, or, to use the legal phrase, the act of God, the consequences of which, like those of storm and fire, should be borne exclusively by the aggrieved party. They often certainly seem to have this character, and it would be little better than heathenism to treat them as the acts of a rational being. On the other hand, they are sometimes just as clearly the offspring of obstinacy, carelessness, and reckless disregard of the public welfare. But where is the line to be drawn? What legal procedure will enable us to change the consequences of the act in question from one party to the other, according to the merits of the case? When the injury is small, and can be repaired without any serious detriment to the estate of the insane party, the course seems to be perfectly clear; but let the damage be sufficiently great to absorb his whole fortune, we hesitate, and look around for some other principle to guide our steps. In this dilemma, I know no better course than to make the general rule in favor of the aggrieved party, and to graduate the amount of damages by the pecuniary means of the parties, to the provocation sustained by the defendant, and any other circumstance which, in a criminal suit, would furnish ground for mitigation of punishment.

In regard to the civil acts of the insane, it is doubtful if the common law has all that certainty which is desirable, or even practicable. The old maxim, that no man shall stultify himself, or in other words, plead insanity, in avoidance of his contracts, has been much disregarded in England, and in many parts of this country has given place to one of an opposite character. To oblige the insane to fulfil

their contracts, would be inconsistent with that protection which the law theoretically holds out, and would prove a strong temptation to fraud, scarcely less iniquitous than the opposite maxim, which allows the insane to take advantage of their infirmity whenever the step may seem to suit their interest. Practically, I can see no difficulty in applying to this subject those rules of honesty and fair dealing, which govern the ordinary transactions of men with one another. Whoever deals with a person manifestly insane is presumptively guilty of fraud, and he cannot reasonably complain, if the law annuls the transaction. And whether the disorder be manifest or obscure, the intimation of his relatives that he is mentally incompetent to transact business, although they may decline to place him under guardianship, ought to be regarded as sufficient to stop the plea of ignorance. A law embodying this principle cannot be considered as severe, for certainly there can be no great hardship in merely abstaining from transactions with the insane, while it would inflict a hardship and an outrage upon the family or heirs of the insane person, to allow property on which they may depend for support, to become the prey of dishonest and designing men. On the other hand, a contract for necessaries or comforts suitable to the means and condition of the party cannot be annulled upon any principle of fair dealing, and, accordingly, such transactions are now universally sustained. And in general terms, when the mental impairment was unknown and no reason existed for suspecting it, when the transaction is shown to be a fair one, accompanied by no suspicious circumstances, it would be grossly unjust to allow the insane person to avoid the contract, whenever it might appear to him or his heirs for their interest to do so.

In regard to testamentary acts, the English law has always shown more indulgence, than in regard to other civil acts. The lighter degrees of mental impairment, especially that kind which accompanies the decay of old age, however much they might vitiate a contract, have not generally been regarded as implying testamentary incapa-

city, unless the instrument itself contained some disposition "sounding to folly," or evidence were produced showing improper influence. It is often very difficult to ascertain with any degree of precision, the mental condition of a testator, and, on this subject, we are reduced to the alternative of rejecting a large proportion of wills, or of overlooking mental impairments that would unquestionably disqualify a person from making a contract. It would be foreign to our present purpose to show the reasons that have led to the adoption of the latter branch of the alternative, in the English courts. It is enough to say that the practice is just and reasonable, and therefore requiring a place in a general law.

While discussing the legal relations of the insane, we ought not to pass over without notice a class of persons who, though not insane in the ordinary acceptation of the term, are found in considerable numbers in our hospitals. I refer to those whose mental infirmity consists in an uncontrollable propensity to indulge in intoxicating drinks. Public order, domestic peace, and their own restoration require their seclusion, and the step is often taken. It has not, however, the sanction of law, and exposes whoever is engaged in carrying it into effect, to an action for false imprisonment. The necessity of restraint in these cases is sufficiently obvious without any farther explanation, and the time has now come when *habitual drunkenness* should subject an individual to all the liabilities and disabilities of insanity. I have not, however, thought it proper, under the circumstances, to introduce a provision to this effect, into the proposed law. It will answer my purpose, to make the suggestion.

The following project of a law for meeting the various exigencies above-mentioned, I offer for the public consideration, with the more confidence, that it has received the approval of a gentleman of distinguished legal attainments, the Hon. Luther S. Cushing, whose experience upon the bench strongly impressed him with the deficiencies of the present law. I am indebted to him for many valuable hints,

and the provisions of the third and fourth sections, which may be regarded as among the most important of the proposed act, were adopted at his suggestion.

I may be allowed to add, to prevent any possible misunderstanding, that my object in the present attempt, was, not to frame a statute in legal phraseology, but to present the general principles which should regulate all legislation for the insane, their application, of course, to be modified by the circumstances of each particular community.

Proposed Law.

1. Insane persons may be placed in a hospital for the insane, by their legal guardians, by their relatives or friends in case they have no guardians, and, if paupers, by the proper authorities of the towns or cities to which they are chargeable, but in all cases according to the rules hereinafter mentioned for the admission of persons into such hospitals.

2. Insane persons may be placed in a hospital by order of a magistrate, who, after proper inquisition, shall find that such persons are at large, and dangerous to themselves or others.

3. Insane persons may be placed in a hospital by order of any Justice of a law court, after the following course of proceedings, viz.: on statement in writing of any respectable person, that a certain person is insane, and that the welfare of himself or of others requires his restraint, it shall be the duty of such Justice to appoint immediately a commission who shall inquire into and report upon the facts of the case, expressing an opinion either for or against the contemplated confinement. If the former, the Justice shall issue his warrant for such disposition of the insane person as will secure the objects of the measure.

4. The commission provided in the last section shall be composed of not less than four, nor more than six persons, one of whom, at least, shall be a physician, and another, a lawyer. In their inquisition they shall hear such evidence as may be offered touching the merits of the case, as well

as the statements of the party complained of, or of his counsel. The party shall have seasonable notice of the proceedings, and the Justice is authorized to have him placed in suitable custody while the inquisition is pending.

5. On a written statement being addressed by some respectable person to any Justice of a law court, that a certain person then confined in a hospital for the insane, is not insane, and is thus unjustly deprived of his liberty, the Justice shall appoint a commission of four persons, one of whom, at least, shall be a physician, and another a lawyer, who shall hear such evidence as may be offered touching the merits of the case, but, without summoning the party to meet them, shall have a personal interview with him, so managed as to prevent him, if possible, from suspecting its objects. They shall report their proceedings to the Judge, and if, in their opinion, the party is not insane, the Judge shall issue an order for his discharge.

6. The commission provided for in the last section, shall not be repeated, in regard to the same party, oftener than once in six months; and in regard to those confined under the third section, such commission shall not be appointed within the first six months of their confinement.

7. Persons confined in a hospital under the first section of this act, may be removed therefrom, by the party that placed them in it.

8. Persons confined in a hospital under the second section of this act, may be discharged by the order of a magistrate, on recognizance being entered into by competent authority, that the party shall not be suffered to be at large until recovered from his disorder.

9. On statement in writing being addressed to a Justice of a law court by some friend of the party, that a certain person confined in a hospital under the third section, is losing his bodily health, and that his own comfort would consequently be promoted by his discharge, or that his mental disease has so far changed its character as to render his farther confinement unnecessary, the Judge shall make suitable inquisition into the merits of the case, and accord-

ing to its result, he may or may not order the discharge of the party.

10. Persons confined in any hospital for the insane, may be removed therefrom, by parties who have become responsible for the payment of their expenses; provided that such obligation is the result of their own free act and accord, and not of the operation of law, and that its terms require the removal of the patient in order to avoid farther responsibility.

11. Superintendents of hospitals for the insane shall receive no person into their custody, under the provisions of the first section, without a written request from some one authorized therein to make it, and a certificate of insanity from some regular physician.

12. Insane persons shall not be made responsible for criminal acts in a criminal suit, unless such acts shall be proved not to have been the result, directly, nor indirectly, of insanity.

13. Insane persons shall not be tried for any criminal act, during the existence of their insanity; and for settling this issue, one of the Judges of the court by which the party is to be tried, shall appoint a commission, consisting of four persons, one of whom, at least, shall be a physician, who shall examine the prisoner, hear the evidence that may be offered touching the case, and report their proceedings, to the Judge, with their opinion respecting his mental condition. If it be their opinion that he is not insane, he shall be brought to trial; but if they consider him insane, or, are in doubt respecting his mental condition, the Judge shall order him to be confined in some hospital for the insane, or some other place favorable for a scientific observation of his mental condition. The person to whose custody he may be committed, shall report to the Judge respecting his mental condition, previous to the next term of the court, and if such report should not be satisfactory, the Judge shall appoint a commission of inquiry, in the manner just mentioned, whose opinion shall be followed by the same proceedings as in the first instance.

14. Any person in confinement waiting trial for crime, shall be examined by a commission appointed and constituted as in the last section, by any Judge of the Court by which he is to be tried, when satisfied that there are reasonable grounds for suspecting the prisoner to be insane, and the report of the commission shall be followed by the same proceedings as in the last section.

15. Whenever any person shall be acquitted in a criminal suit, on the ground of insanity, the jury shall declare this fact in their verdict, and the court shall order the prisoner to be committed to some place of confinement, from which he may be discharged under the provisions of the fifth section.

16. Application for the guardianship of an insane person shall be made to the Judge of probate, who, after a hearing of the parties, shall grant the measure, if satisfied that the person is insane, and incapable of managing his affairs discreetly. Seasonable notice shall be given to the person who is the object of the measure, if at large, or, if under restraint, to those having charge of him, but his presence in court may be dispensed with, if in the opinion of a regular physician it would probably be detrimental to his mental or bodily health. The removal of the guardianship shall be subjected to the same mode of procedure as its appointment.

17. Insane persons shall be made responsible in a civil suit, for any injury they may commit upon the persons or property of others; reference being had, in regard to the amount of damages, to the pecuniary means of both parties, to the provocation sustained by the defendant, and any other circumstance which, in a criminal suit, would furnish ground for mitigation of punishment.

18. The contracts and other civil acts of the insane shall not be valid, unless it can be shown, either that such acts were for articles of necessity or comfort suitable to the condition and means of the party, or that the other party had no reason to suspect the existence of any mental impairment, and that the transaction exhibited no marks of unfair advantage.

19. When the mental condition of a testator is rendered doubtful, though not shown to have been unequivocally insane, nevertheless the testamentary act shall be admitted to probate, if it appear to be a rational act, rationally done.

THE PLEA OF LUNACY.[1]

Reg. v. Pate.

It is time that a more precise and definite standard be established, whereby to test pleas of lunacy, than now exists. The recent case of *Reg.* v. *Pate* suggests the occasion.

We have always denounced the morbid sentimentality which has too often availed itself of any slight pretence for this plea in behalf of the lives of murderers, at the risk of the lives of the innocent millions, whose security is diminished by each act of undue lenience towards those who endanger it.

It must be fresh in the recollection of our readers, how many cases have justified this remark. Until that excellent judge, Mr. Baron Rolfe, set the example of denouncing this abuse of justice, and gave a check to the indiscriminate favor with which the plea of insanity was received, both on the bench and in the jury box, it promised to become a certain means whereby criminals of the deepest die might always escape, provided only they added cunning to atrocity, and prefaced murder by acting madness.

It seems difficult in England for the public mind to abandon one excess, without running into the opposite extreme. From foolish credulity in pleas of insanity, we are now betaking ourselves to an equally unjust and irrational rejection of them. Pate's case is a signal instance. We speak but the commonly expressed opinion at the bar, that his

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[1] While upon the subject of insanity, we take the liberty to publish the above article from the London Law Magazine, in relation to a recent highly interesting English case. — *Ed. Law Rep.*

conviction was directly and palpably against evidence. There is a principle, as it seems to us, deducible from it, which makes it well worth careful examination.

Mr. Pate was a lieutenant in the celebrated regiment the 10th Hussars. He was not only the son of a gentleman of fortune, but, according to the testimony of the colonel of the regiment, he was, without doubt, himself a gentleman. Without the slightest provocation of any kind, and without any motive assigned or assignable by himself or by others, on the evening of the 27th June, he places himself at the gates of Cambridge House, in Piccadilly, where the Queen then was paying a visit to her dying relative, and in the presence of a crowd of people, in broad daylight, strikes the Queen a violent blow on the head, with a stick, as she is passing out into the street.

Now if the case rested here, and these facts were alone made known to any person of ordinary judgment, in 999 cases out of 1000, his comment and conclusion would be that the man must have been mad who did so. The first impression thus generally suggesting itself to the mind, is usually the correct one; the more ordinary and familiar its occurrence to the mind, from a given set of facts, the more likely is it to be the right impression. Now let us see how far the remaining facts in this case fortify and confirm such first impression. Let us turn to the additional evidence, which we will extract, as it came out at the trial, interspersed with occasional comments of our own.

"Colonel John Vandeleur said, — I was lieutenant-colonel of the 10th Hussars when Mr. Pate joined the regiment in 1841, as cornet. He afterwards became lieutenant. He remained in the regiment till March, 1846, and during that time the regiment was quartered in England and Ireland. While we were stationed at Cahir, I remember an accident happening to the prisoner's horses and dog. From the moment the prisoner joined the regiment, I thought there was something strange in his conduct. His hair was cut very short, and I fancied his head had been shaved. He discharged his duties as an officer very well; and as to his being a gentleman, there is no doubt about that. He was a person of mild demeanor,

and very much respected in the regiment. He had three horses and a Newfoundland dog, and he was very much attached to them. The prisoner's horses and dog were bitten by a mad dog belonging to another officer, and they were all destroyed. From this period I observed a great change in his conduct, and he appeared very much excited in consequence of a correspondence that took place between his father and the Duke of Wellington, upon the subject of these horses. A claim was made upon Captain Wallington, to whom the dog that bit the prisoner's horses belonged, through the Duke of Wellington, and the prisoner seemed hurt that his friends should have made such a claim."

Another witness, Corporal Venn, adds: —

"I was in the regiment when Mr. Pate joined. I remember it being discovered that his horses had been bitten, and they went mad, and two of them were shot. Mr. Pate was very much concerned at the loss of one of these horses. After the first horse was taken ill, he said that if any thing happened to the other — his big horse, as he called him — he did not know what he should do, *and he should be inclined to make a hole in the river.*

"George Pitt, a sergeant in the 10th Hussars, also spoke to the fact of the demeanor of the prisoner when his horses were destroyed. He said that he was very much attached to his horses, and after they were killed he appeared very much depressed, and his conduct was very eccentric."

This loss of his horses and Newfoundland dog appear to have given the first decisive blow to the balance of reason; a more likely cause can certainly not well be imagined, if, as it seemed, there was some previous predisposition to mental disease. The shock would be a severe one to a person of the soundest intellect. The effects in Mr. Pate's case were not only *unmistakable*, but *immediate*.

Colonel Vandeleur says: —

"He appeared to avoid company, and used to take long, solitary walks by himself, and he complained to me that he was ill just before he returned to England. He said he had applied to the doctor of the regiment, and he could give him no relief. I asked him what was the matter with him, and he said his stomach and bowels were full of bricks, and that the doctor had not the skill to remove

them. To the best of my knowledge the prisoner never replaced the horses that were killed, except one. The prisoner was constantly on the sick list after this. I considered he was laboring under a delusion. I sent him in command of a detachment from Newbridge to Dublin, in 1845, and he had orders to return the next day, but he left his detachment at Dublin without leave, and returned to England. This was a serious military offence, and I communicated with General Wyndham upon the subject. He returned in ten days. He was not brought to a court-martial. When he came back he appeared very well, and he gave no explanation for his going away. I communicated with his father in as delicate a manner as I could, and the prisoner left the regiment two months afterwards."

This evidence was entirely unshaken in cross-examination.

"Captain Frith said, — I was formerly in the 10th Hussars. The prisoner joined about a year before me. I was very intimate with him, and remember hearing of the accident to his horses. His conduct was always that of a gentleman and an officer, and he was very much liked in the regiment. After the accident there was a great change in his manners and conduct. He frequently absented himself from mess, and took long solitary walks. He also complained of the mess-men and the cook, and said that they had conspired to poison him. I tried to convince him to the contrary, but could not do so. He also told me that there were stones and bricks in his stomach. Sometimes he was very reserved, and at others very wild and excited, without any apparent cause, and I thought his mind was impaired by the loss of his horses and dog. When he left the regiment he gave all his appointments to the adjutant of the regiment, which was not a usual thing. They were very valuable.

"O'Gorman Mahon, — I have known the prisoner for eleven months. From the first day I ever saw him I was under the impression that he was not a sane man, and my opinion was confirmed at the subsequent interviews I had with him."

Sir Thomas Munro says Mr. Pate "was *always* odd." He saw him after the accident to his horses and dog, and thought him then "more odd than before." "His

manner and conduct were the subject of conversation in the regiment."

"Thomas Martin, the trumpeter to the regiment, gave similar evidence. — He also said, that it was generally remarked among the troops, that he was not right. Sometimes he would stand looking, as though lost in thought, and then he would suddenly start off as though walking for a wager."

Mr. Robert Pate, the prisoner's father, says, that when he returned home without leave,

"I told him I was astonished and hurt at his conduct, and asked for an explanation, and he said he had been hunted about Dublin streets by people, and he had seen the same people at the barracks, and he had even seen them about the hotels in London, and he said he had made his escape from Dublin in a vessel coming to Liverpool."

The father also consults Dr. Conolly about him, and "thought he must eventually come to an asylum."

We now come to a more recent period, before the assault on her Majesty: —

"Charles Dodman said, that he was servant to the prisoner while he was in the 10th Hussars. His conduct was always strange and eccentric. After the prisoner left the regiment, witness was again engaged as his servant. At this time he was living in Jermyn Street. His habits were very regular. He rose at seven o'clock, and first put his head into a large basin of water, and then he had a bath, in which he placed whisky and camphor. A pint and a half of whisky and two ounces of camphor were the allowance for three mornings; and while he was in the bath he used to shout violently, and sometimes he would sing. He never mixed with society, and always kept his blinds drawn down. It was also his custom, when St. James's clock chimed a quarter past three, to go out in a cab, and nothing could stop him from going at that precise moment. He gave nine shillings for a ride, and would always pay in shillings, and witness had to provide a sixpence and a large penny, to pay the gates and the bridge, and he would not use any other coins. The prisoner's dress was always the same, winter and summer. The riding in the cab continued for a period of eighteen months, and during that period he only once received company."

The next witness discloses the conduct of the prisoner during the drives: —

"Edward Lee, a cab driver, said he was in the habit of driving the prisoner from November, 1847, and he fetched him regularly every day at one time, a quarter past 3. We always went the same route, over Putney Bridge to Putney Heath, and to one particular spot. The prisoner used to get out of the cab and walk through the thickest of the furze bushes and gorse, and he was out of my sight for about ten minutes. Used to meet him again at one particular spot near a pond, and had seen him stand and look at the pond a few minutes and then jump into the cab. Sometimes the prisoner would tell him to gallop, and then he would pull him up and make him go at a foot pace. They used then to go to a particular place at Barnes Common, where he got out again and walked through all the furze bushes, and then they went home by Hammersmith Bridge. Witness always thought he was not right in his mind, and in the winter time he was alarmed at him. In all weathers, rain, hail or snow, he used to get out and walk through the furze bushes, and he did so when it was quite dark. He was continually flourishing his stick while he was in the cab, but sometimes he would sit quite still, and people had asked him if the gentleman was right in his mind. What he had stated took place every day for eighteen months and in all weathers. He at first received 10*s.* for the journey, but afterwards Mr. Pate gave him 9*s.*, and he was always paid in shillings, and the heads of the shillings were always uppermost and always turned one way."

Nor do these facts rest only on the evidence of the cabman: —

"Mr. James Starton, a surgeon, residing in Saville Row, had previously seen him in Kensington Gardens, and judged from his appearance that he was insane. He was throwing his arms and hands about in a most extraordinary manner, and his look was that of a man whose mind was not right. At this time he did not know who he was, but after he was introduced to him he recognised him as the same man. He had conversed with him, and although there was certainly nothing insane in his conversation, yet from his mode of talking he should not set him down as a man possessing a sound mind. Upon one occasion witness advised him to obtain a classical education to fit him for some other occupation, as he had left the

army, and his reply was, that no man in England was capable of teaching him any thing. * * * Witness always entertained the impression that the prisoner would commit some violent act."

Two more extracts bring the narrative to the assault itself. They speak to the continuance of the insane manifestations immediately before the event.

Captain Frith says —

"I saw the prisoner about 3 o'clock on the day the blow was struck at her Majesty, midway between Duke Street and Hyde Park Corner, and I observed that his manner was more excited than usual. He was in the habit of swinging his arms and stick, and on this day he did so more than usual, and every one turned back to look at him. I have met him at different times, and he was always walking in the same remarkable way, but I had never seen him so excited as on this day."

The Rev. Mr. Driscoll saw him at 6 o'clock the same evening, and also remarked "that he then appeared much more excited than usual."

Dr. Conolly, who had been long since consulted in his case, said —

"I have conversed with the prisoner since this transaction, and in my opinion he is a person of unsound mind. I form this opinion from the conversations I myself have had with him, and from all the other facts I have heard, but principally from the former. It seemed to me that he has a very small share of mental power, without object or ambition, and unfit for all the ordinary duties of life. In conversation he would undoubtedly know the distinction between a right and a wrong action, but I should say that he would be subject to sudden impulses of passion; but he seems to have acted under some strange sudden impulse, which he was quite unable to control.

"Dr. Munro said — I have had five interviews with Mr. Pate since this transaction, and from my own observation, and what I have heard to-day, I believe him to be of unsound mind. I agree with Dr. Conolly, that he is not laboring under any specific delusion."

What are the facts on which, in the teeth of this phalanx of evidence, the attorney-general relied for a verdict of acquittal?

First, as to facts: —

1. Mr. Pate had never been treated as an insane person. [Perhaps not, but was he the less insane on that account? Few persons are so treated who do not in some way annoy others. This was the first act of annoyance to others.]

2. He had sold his commission, and had been allowed to appropriate the proceeds and to manage his own affairs. [This is the same thing as the foregoing — it necessarily results from it. The attorney-general, moreover, answers his own argument, and destroys it by blaming the father for not having exercised some control.]

"What was the prisoner's conduct when he was taken into custody? Did it not clearly show that he was perfectly well aware of what he had been doing, and was his conduct any thing like that of an insane person? All he endeavored to do was to palliate his offence. He was perfectly aware he had done wrong, and he sought to extenuate the act by saying that the witnesses could not tell whether he struck at the queen's face or at her bonnet, and he subsequently said that it was only a little blow with a light stick. This plainly showed that he knew well what he had done, and that it was a wrong act, and it put an end to the defence altogether."

Indeed it does not. Let us turn to the law. It was thus laid down by Mr. Baron Alderson: —

"The prisoner was proved to have been perfectly well aware what he had done immediately afterwards, and in the interview which he had had since with one of the medical gentlemen, he admitted that he knew perfectly well what he had done, and ascribed his conduct to some momentary uncontrollable impulse. The law did not acknowledge such an impulse if the person was aware that it was a wrong act he was about to commit, and he was answerable for the consequences. A man might say that he picked a pocket from some uncontrollable impulse, and in that case the law would have an uncontrollable impulse to punish him for it. What evidence was there then in the case, to justify them in coming to the conclusion, that when the prisoner struck the queen, he did not know it was a wrong act — in fact, that what he was doing was wrong?"

We have the highest respect for the judicial talent and acumen and great experience of this learned Judge: but,

with great deference, we think this doctrine scarcely reconcilable with the admitted principle of responsibility. It appears to us that this depends on the volition of the perpetrator of the crime as much as on his knowledge of right and wrong. We cannot distinguish between compulsion from within and from without constraining an act. The man who should be forced by the power of another person to commit what he knew was a crime — for instance, to strike a blow by manual compulsion, — would be certainly held blameless and irresponsible for his act, simply because he could not resist the motive power. But if that controlling power spring from internal disease instead of external violence, how is the case altered as to his irresponsibility? Surely nowise. The only question is, Is it really and truly an irresistible impulse? In Pate's case Dr. Conolly swears it was; for he says, "He seems to have acted under some strange sudden impulse which he was quite unable to control." Then on what principle is he punished? We have conferred with medical men before committing ourselves to the opinion we are about to express, and we find that such sudden impulses (even where persons are quite aware the act they are driven to is wrong) are by no means rare, and that they are perfectly uncontrollable.

We demur, therefore, wholly to the doctrine that there is no better test of pleas of insanity than whether the prisoner knew right from wrong. The real question is, could he restrain himself or not?

That there was ample evidence of insanity up to the moment of the act is incontestable, and the verdict is directly against it. It is, of all the cases we have yet read of, the fittest for reprieve. It will consign the unhappy man to the care and treatment he most needs.

So far from its being beside the question that Mr. Pate was an officer of character, it appears to us to have been an essential link in the evidence, and to have been most justly used by Mr. Cockburn in his very able speech, as the strongest possible presumption in favor of his insanity. It renders the hypothesis arrived at by the jury repugnant to all

probability and reason — namely, that a perfect gentleman, and an officer in a distinguished regiment, who had so conducted himself while in it as to earn the esteem of the gentlemen who were his comrades, should, whilst in possession of his faculties and under self-control, have deliberately struck a woman, and that woman his sovereign! The evidence reduces the verdict to this moral impossibility! It is one which wrongs the prisoner, outrages his family, and insults the army, whilst it affords neither redress for the past, or safety for the future, to our beloved queen.[1]

Recent English Decisions.

Vice-Chancellor Wigram's Court.

Dobson *v.* Land.[2]

If a mortgagee of houses, not entitled by express contract to insure the premises against fire at the mortgagor's expense, nor entitled to require the mortgagor to insure them against fire, nevertheless does so insure them, without the privity of the mortgagor, he will not be allowed, as a matter of course, to add the premiums of the policies to his mortgage debt, and charge them against the mortgage premises.

A mortgagee, though in some respects a trustee for the mortgagor, is not

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[1] There is no doubt but that the jury were influenced in their verdict by the loyal desire to ward off similar outrages from the person of the sovereign. But it can have no such effect. No sane person can possibly hope to escape for any similar offence merely because an *in*sane one was shut up in a madhouse instead of a prison for committing the act. No *in*sane person can be deterred by such appeal to reason or dread, for the very fact of their insanity prevents the punishment from having any such effect. Its deterring and salutary influence belongs only to cases in which the recipient is a responsible being as well as guilty. Can any one in their conscience say that Mr. Pate was?

[2] This decision has given rise to some discussion in the English law journals, although it seems to be in accordance with the usage in this vicinity. As it is a matter of some practical importance, we publish it, with a criticism from the London Jurist.

so to all intents and purposes; nor is he in all cases subject, as regards the mortgage property, to the rules of the Court restraining persons, filling a fiduciary character, from having any dealings for their own benefit.

THIS was a foreclosure suit. The plaintiffs were mortgagees in possession of certain houses, mills, machinery, and premises, which were conveyed and assigned to them, or to those under whom they claimed, by three several indentures of mortgage, dated in March 1817, March 1819, and March 1824, as security for the respective sums of 1400*l.*, 3000*l.*, and 1600*l.* The first and third of these indentures contained a covenant by the mortgagors to insure, and keep insured, the premises in the joint names of themselves and the mortgagees, to the amount secured by those indentures respectively. The second indenture contained a similar covenant by the mortgagors, with the addition of a provision, that in case the mortgagees should at any time advance and pay the premiums and duty for the insurance thereby covenanted to be made, the payment or payments which should be so made by them should be a charge upon the mortgage premises. The original mortgagor died in 1825, and, the interest upon the debt having fallen into arrear, the mortgagees entered into possession of the premises in 1826. The usual account having been directed by the decree at the hearing, the mortgagees took in a claim before the Master for 900*l.*, advanced by them in payment of the premiums of insurance against fire effected upon the premises. No policies were produced in the office, and it did not appear whether the insurances had been effected in the joint names of the mortgagors and mortgagees, or in the names of the mortgagees only. The Master, acting on the latter hypothesis, allowed only half the sum claimed, on the ground that the indenture of March, 1819, by which half the plaintiffs' debt was secured, was the only instrument enabling the mortgagees to insure at the expense of the estate. The Master's report was excepted to, both by the plaintiffs and the defendants. By the former, on the ground that the whole sum claimed

by them, for premiums paid by them, ought to have been allowed; and by the latter, that the Master ought not to have allowed any thing in respect of premiums paid by the mortgagees, inasmuch as it did not appear that the insurances had been effected, in conformity with the terms of the covenant, in the joint names of the mortgagors and mortgagees; and the mortgagees could not, in the absence of a special contract, be allowed to insure in their own names, and add the sum paid for premiums to their charge as against the land. At the hearing of the exceptions, an objection was taken, on behalf of the mortgagors, and allowed, to the production of the policies of insurance, the same not having been produced in the Master's office; and the argument proceeded without the aid of such production.

The *Solicitor-General* and *Batten*, for the mortgagors.—In the absence of the policies, which have not been produced either here or in the Master's office, it cannot be ascertained whether the insurances have been effected in conformity with the terms of the covenants contained in the mortgage deeds. The question, therefore, must be considered in the abstract, and is, whether, in the absence of an express contract between a mortgagor and mortgagee, the latter may insure the mortgaged premises in his own name, and add the premiums to his debt as against the land? It is submitted that he cannot. If he can, then, as a consequence, the mortgagor would, in the event of the premises being burnt down, be entitled to the sum secured by the policy; but there is authority for saying that he would not be so entitled. The insurance is, in effect, a speculation by the mortgagee, who would, in the event of fire, be entitled to receive the money recoverable under the policy, and the whole of his mortgage debt besides; just as, in the case of lessor and lessee, one may insure, and in the event of fire receive the value, without being accountable to the other, the transaction being held not to affect the right between the parties. *Brown* v. *Quilter*, Amb. 619; *Hare* v. *Groves*, 3 Anst. 687; *Holtzapffel* v. *Baker*,

18 Ves. 115; *Leeds* v. *Cheetham*, 1 Sim. 148. A mortgagee in possession is, to all intents, a trustee for the mortgagor after payment of the debt, and any dealings by him for his own benefit will not be allowed to affect the trust estate.

Kenyon Parker and *Hardy*, for the mortgagees. — A mortgagee in possession has been described as "a bailiff without any salary, accountable to the mortgagor, but not paid by him;" (*Leith* v. *Irvine*, 1 My. & K. 286; *Davis* v. *Dendy*, 3 Mad. 170; *Quarrel* v. *Beckford*, 1 Mad. 269); and, as such, he is to be repaid sums which he has laid out in the prudent management and care of the estate, with interest. *Hardy* v. *Reeves*, 4 Ves. 466; Jarman's Bythewood, by Sweet, vol. 6, p. 399; *Sandon* v. *Hooper*, 6 Beav. 246. On the other hand, he is answerable for misconduct or gross negligence in the management of the estate. *Hughes* v. *Williams*, 12 Ves. 495; *Wragg* v. *Denham*, 2 Y. & C. 117; *Godfrey* v. *Watson*, 3 Atk. 518; *Russell* v. *Smithies*, 1 Anst. 96; *Moore* v. *Paynter*, 6 Jur. 903. The property in question in this case consists of buildings and machinery, which specially require insurance against fire in the common course of business. No prudent owner would have omitted to insure, and it is submitted, therefore, that the mortgagees are entitled to be repaid such sums as they have fairly laid out in maintaining the policies. The original mortgagor died in 1825, and the mortgagees entered into possession in 1826, and the sums claimed are in respect of premiums paid since that time. This was nothing more than a reasonable act on the part of a mortgagee in possession, who is therefore entitled to be indemnified to that extent. *Detillin* v. *Gale*, 1 Eden, 169; *Dryden* v. *Frost*, 3 My. & C. 675.

Wood and *M. A. Shee*, for defendants in the same interest as the mortgagees. — The mortgagees, though in possession of the property, have no insurable interest therein, irrespective of the mortgage debt; and the insurance, in case of fire, would have inured for the benefit of the mortgagors; just as, in the case of a renewal by a mortgagee

of a renewable lease, the mortgagee is considered a trustee of the renewed lease for the mortgagor. *Giddings* v. *Giddings*, 3 Russ. 241; *Webb* v. *Lugar*, 2 Y. & C. 247. The mortgagees, in case of fire, could not have retained the money as against the mortgagors. *Ex parte Andrews*, *re Emmett*, 2 Rose, 410; *Baldwyn* v. *Bannister*, 3 P. Wms. 251, note (*a*); *Phillips* v. *Eastwood*, Lloyd & G. 289; *Holland* v. *Smyth*, 6 Esp. 11. The cases between landlord and tenant have no application to the present case, there being in those cases no privity in account between the parties. *Leeds* v. *Cheetham*, 1 Sim. & S. 146.

Torriano, for other parties in the same interest.

The Solicitor-General, in reply.

March 27 — Sir JAMES WIGRAM, V. C. — In the absence of the policies of insurance, which have not been produced either in the Master's office or before me, the question raised by the fifth of the exceptions taken by the defendants to the Master's report is, whether, if a mortgagee of houses, not entitled by express contract with the mortgagor to insure the premises against fire at the mortgagor's expense, nor entitled to require the mortgagor to insure them against fire, thinks proper, without the privity of the mortgagor, to insure the premises against fire — whether in such a case the mortgagee is entitled, as a matter of course, to add the premiums of the policies to his mortgage debt, and charge them against the mortgage premises. In the case before me the mortgagees are entitled by contract, in certain events, to charge the premises with the premiums of insurance against fire; but, as the policies have not been produced, I am not at present in a condition to determine whether the insurances effected are within the terms of their contract, and therefore I am compelled at present to try the question in the abstract. Now, in the absence of authority, I certainly think the decision ought to be against the right of the mortgagees to make such a charge. It was admitted in argument, that if the mortgagees had a right to make this charge, the mortgagors must have had a corresponding right to require that the

sums payable on the policies, in case the property had been destroyed by fire, should be laid out in restoring the premises, and the question was argued in that view of the case. The argument for the mortgagors was, that the mortgagees were trustees for them, and that they had no insurable interest in the property except that which the mortgage gave them; and on these premises the conclusion was rested, that whatever they did as mortgagees must inure to the benefit of the mortgagors, subject to the payment of the mortgage debt. In the absence of authority I am not prepared to adopt that conclusion. I must observe that I do not see how the question could be affected by the circumstance, that the mortgagees were in possession. Now, that a mortgagee is in some sense a trustee for the mortgagor may be admitted, for the person in whom the legal estate is vested, with a beneficial interest in another person, is, in a sense, a trustee for that person. In some sense a mortgagee is in a worse position than a trustee, for a trustee, in an ordinary case, is not liable to a decree for wilful default, unless a special case be proved against him; whereas such a decree is always of course, as against a mortgagee in possession. On the other hand, a trustee can never make a benefit to himself by any dealing with the trust property; but if a second mortgagee should buy in the first mortgage for half its amount, or even obtain an assignment without consideration, I can have no doubt he would be entitled to charge the mortgagor with the full amount of the first mortgage, in addition to his own; and other cases of a like kind might be put. This destroys the integrity of the proposition contended for by the mortgagors; and I confess I have great difficulty in seeing why a mortgagee, as between himself and the mortgagor only, should not be allowed to make any contract he pleases, collateral to, and not affecting, the mortgage premises: just as a lessor or lessee may insure the leasehold property as against the other, but without giving him any interest in the policy. Questions may arise with the insurance offices, but that is foreign to the matter in hand.

Two cases, however, were cited, which it was said were authorities in support of the claim of the mortgagees. Those cases were ***Ex parte Andrews, re Emmett***, 2 Rose, 410, and ***Baldwyn*** v. ***Bannister***, 3 P. Wms. 251, note (*a*). With respect to the former, Sir T. Plumer certainly, in the first part of his judgment, uses expressions favorable to the claim of the mortgagees, but ultimately he declines to decide the case on that ground, and rests his judgment on the ground of trust; and, upon looking at the case, it will be found that the transaction was, in terms, a trust, and not a mortgage. The other case is, I admit, more difficult to be got over. It might be distinguished from the present case, on the ground that the purchase of the right to dower of the mortgagor's widow was a dealing with the mortgaged property itself; but I do not think that is a distinction in principle. That case is very shortly stated, and no light is thrown upon it by the Registrar's book, to which I have referred. Neither the arguments of counsel nor the judgment of the Court appears. I cannot deny that I consider the case an authority adverse to my own view; but I cannot follow it, without deciding, in effect, that a mortgagee is, to all intents and purposes, a trustee for the mortgagor, and subject to the same rules upon which the Court restrains persons, filling a fiduciary character, from having any dealings for their own benefit. The principle upon which that doctrine is founded does not apply to the case of mortgagor and mortgagee; and I have already shown that it is not so applied by the Court.

No order was made upon the exceptions respecting the premiums; but a reference back to the Master was directed, to inquire and state the provisions of the policies of insurance; with liberty to receive further evidence in respect thereof, and to state special circumstances.

In a late case (*Dobson* v. *Land*, 14 Jur. 288) it has been decided by Wigram, V. C., that if a mortgagee of household property, who is not entitled to insure the premises by express contract, nevertheless does insure them without the privity of the mortgagor, he will not be entitled,

on redemption by the mortgagor, to add the premiums of insurance to his mortgage debt. With great deference to the learned Judge who decided that case, we venture to submit the following reasons why, it is conceived, that decision cannot be supported.

At law the mortgagee is the absolute owner of the mortgaged premises, and may deal with the property in all respects as if it were his own; he may fell timber, pull down houses, and commit all manner of waste, without incurring any liability to answer to the mortgagor for such proceedings in a Court of Law; and, before the jurisdiction of our Courts of Equity had arisen, an unfortunate mortgagor, who had allowed his mortgage to become absolute at law, was without remedy, and lost his estate forever. It is only through the medium of the Court of Chancery that the mortgagor can control the rights of ownership which the legal estate confers upon the mortgagee. Now, what is the principle on which the Court of Chancery interferes with those legal rights? That Court has never said that the mortgagee shall exercise none of his legal rights; that Court never, for instance, restrains the mortgagee from bringing ejectment to obtain possession; nor, if the security be not otherwise ample, will it restrain the mortgagee from exercising his legal right to fell timber. (*Witherington* v. *Banks*, Sel. Cas. Ch. 31.) If the mortgagee, who is absolute owner at law, exercise his legal rights fairly and reasonably, for the better securing of his mortgage debt, the Court of Chancery will not restrain him, but, on the contrary, considering those legal rights as part of the mortgagee'e security for his debt, will decree redemption to the mortgagor only upon the terms of his indemnifying the mortgagee from all the expenses which the latter may have incurred in their fair and reasonable exercise. It is on this principle, that, if a mortgagee has made a settlement of the mortgage, the mortgagor must pay the costs of all the parties which such settlement has made necessary parties to a suit for redemption, notwithstanding that they are made necessary parties by the act of the mortgagee alone. (*Wetherall* v. *Collins*, 3 Mad. 255.) "It seems, at first sight," said Sir J. Leach, in giving judgment in this case, "a great hardship that the mortgagor is to pay the costs of persons claiming under the mortgagee, and made necessary parties by his act; but it is the constant practice of this Court, and is to be supported on this principle, that, at law, after a mortgage is forfeited, the estate is the absolute property of the mortgagee, and he may deal with it as his own; and that if the mortgagor comes for the redemption which the equity of this Court gives him, it must be upon the terms of indemnifying the mortgagee from all costs arising out of his legal acts."

It is on the same principle that a mortgagee of renewable leaseholds may, without express contract, renew, and add the expense of renewal to his mortgage debt. The legal estates gives him the legal right to renew: this legal right is a part of the security for his debt, and if it be exercised by him, the Court of Chancery will decree redemption only upon the terms that the expense thereby incurred shall be repaid him by the mortgagor. (*Manlove* v. *Ball*, 2 Vern. 84.)

In the case we are now considering, the mortgagee, in virtue of his legal estate, and as absolute owner at law, has an insurable interest in the property, and a legal right to insure in his own name. (1 Ph. Ins. 108.) Now, when we consider how entirely dependent the mortgagee's security is on the safety of the household property, and that should this property be destroyed by fire the mortgagee's security for his debt would be entirely gone, it must be conceded, that to insure is only a reasonable and fair exercise of the legal right which the mortgage deed has given to the mortgagee, by conferring upon him an insurable interest. If it be said that the mortgagee must take the consequence of his own want of precaution, in not having an express contract that he might insure, it may be answered, that the mortgagor must rather take the consequence of not inserting in the mortgage deed an express provision that the mortgagee should not avail himself of the insurable interest which the mortgage deed has given him. If the mortgagor wishes to prevent the mortgagee from taking possession, an express proviso is inserted for this purpose; for without such proviso the mortgagee has the legal right at any moment to take possession, and the Court of Chancery will not restrain him from so doing. So, also, if the mortgagor wishes to prevent the consequences of the mortgagee insuring, it is incumbent on him to insert an express proviso that the mortgagee shall not insure; for without such proviso the mortgagee has the legal right to insure, and the Court of Chancery will not restrain him. Should the mortgagee insure, then it seems to follow, on the principle laid down by Sir J. Leach in *Wetherall* v. *Collins*, that the Court would decree redemption in favor of the mortgagor only upon the terms that he should repay to the mortgagee, not only the mortgage debt, but also the premiums of the insurance.

If this view of the case be correct, it necessarily follows, that should the mortgagee insure, and receive the insurance money from the office, he will be bound to account to the mortgagor for the money so received. This, we would submit, is also established by authority. It was expressly held in *Ex parte Andrews*, *in re Emmett*, (2 Rose, 410,) that a mortgagee by way of trust, who had insured against a contingency, and had received the insurance money from the office, was bound to account for such money to the mortgagor. The authority of this case was admitted in *Dobson* v. *Land*, but the learned Judge distinguished the case of *Ex parte Andrews* from the case before him, on the ground that the former was a trust, and the latter a common mortgage. But we would with deference submit, that whether the mortgage be made by a conveyance to the mortgagee upon trust to repay himself the debt, and subject thereto upon trust for the mortgagor, or whether it be made in the more common way by conveyance with a proviso for redemption, can make no difference to the question at issue. By the conveyance to the mortgagee, he acquires an insurable interest in the property; this insurable interest, which he acquires only through the mortgage deed, is a part of his security for his debt, and must be held by him upon the same terms as he holds every other interest conferred upon him by that deed, namely, for his own

benefit to the extent of his debt, and then for the benefit of the mortgagor. If, therefore, the mortgagee insure, and receive the insurance money from the office, he will be called upon to account for the money so received, in the same manner as for the rents and profits of the mortgaged property.

In conclusion may be mentioned the case of *Sidaways* v. *Todd*, (2 Stark. 400,) where the same principle was recognized. There a wharfinger had, without the privity of the depositor, insured goods deposited in his warehouse. The goods were destroyed by fire, and the wharfinger received the insurance money from the office. It was held, that although a wharfinger was not responsible for goods casually burnt on his premises, yet, that, having insured, and received the insurance money from the office, he was bound to account for such money to the depositors. The wharfinger had acquired an insurable interest in the goods by their deposit in his warehouse, but as he held the possession of the goods themselves for the depositors, so he held the insurable interest which such possession gave him for them also.

Miscellaneous Intelligence.

[The following communication has been received from a member of the Suffolk bar. It relates to a matter of considerable practical importance.]

Depositions in Perpetuam. — The statutory provisions regarding depositions in perpetuam, we believe have been pretty uniformly understood and practised throughout the Commonwealth. A recent decision, however, of one of the Justices of our Supreme Court, expresses views so essentially different from what we have heretofore supposed to be the law and the sense of the bar on that subject, that we think it calls for notice and comment.

The matter came up on a hearing on a habeas corpus. An application had been made, under the provisions of the Revised Statutes, to two magistrates, counsellors at law, to take the deposition in perpetuam of a certain witness, relating more particularly to certain documentary evidence in his official possession. The magistrates issued the required notices, and summoned the witness to appear and bring with him the said documents or records. The witness appeared with counsel, and objected generally to proceeding. The magistrates considered his objections, and overruled them. The witness then objected, under the provisions of the statute of 1839, chap. 140, and required that the applicant should be examined under oath; and this was accordingly done. The evidence of the counsel for the applicant was offered, but was waived by the witness.

The witness offered no evidence. The magistrates being fully satisfied from the evidence that the testimony was material to the applicant, that it was not sought for the purpose of discovery, or to be used in any suit then pending or thereafter to be brought against the witness, and that the petitioner was in danger of losing the same before it could be taken in any suit, &c., directed the witness to be sworn. The witness was sworn under a protest, and proceeded to testify. He refused to produce the records or documents which he had been ordered to bring with him, or to testify regarding the same, on the ground that it would expose him to a criminal prosecution. The magistrates deciding that his answers would not in their judgment so expose him, ordered him to answer; and on his refusing committed him to custody. A writ of habeas corpus was sued out, and on the hearing the Judge decided, that although the application was in proper form under the provisions of the Revised Statutes, yet the magistrates had no warrant to summon the witness, and had no authority or jurisdiction in the case, and the witness was on that ground discharged.

His Honor went somewhat largely into the general matter of taking depositions in perpetuam, and from his opinion the following propositions are to be distinctly deduced. These we propose to state, and then consider them in their order.

1. That applications to perpetuate testimony are not favored any where; and courts in equity will not sustain a bill to perpetuate where a suit can be brought.

2. That an application or petition, good under the Revised Statutes, might not be good since the statute of 1839.

3. That the application, like a bill in equity to perpetuate testimony, should set forth particularly the *precise* facts which it is desired to perpetuate.

4. That the application should set forth affirmatively all the provisions of the statute of 1839, and state in the outset that the deposition is not sought for discovery, that the testimony is material to the petitioner, that there is danger of losing the same before it can be taken in any suit, &c. &c.

5. That unless the application set out the foregoing provisions named in propositions 3 and 4, the magistrates have no warrant for summoning the witness.

6. That the sole object of taking depositions in perpetuam is to perpetuate facts, all the particulars of which are already known, and in no way whatever to find any fact not known, or the precise nature of any fact generally but not particularly known; and that although a petitioner may desire *bonâ fide* to perpetuate facts which he knows exist in the knowledge of the witness, yet if it seem to appear that he is not precisely aware of the exact form and nature of those facts beforehand, and that the testimony may reveal to him something new in form or substance, it would be an abuse of power to take the deposition, because in that case it would seem to be a seeking after evidence, and not solely a perpetuating it.

7. That the danger of losing the testimony must be peculiar and special, and must so appear affirmatively and indubitably.

8. That the right to depositions in perpetuam is to personal testimony of the witness, and not to papers or records in the witness's possession. That the statute has reference to the witness only, and not to any records he may have the control of. That the danger referred to is of losing the personal attendance of the witness, and not of losing any documentary evidence he may then be possessed of. That although there be danger of losing records or papers, yet if there do not appear to be danger of the loss of the witness himself, the magistrates cannot proceed.

9. That the magistrates can have no discretion in the matter. The whole subject being under the present law purely a matter of statute, no discretion is allowed.

10. That the objection to the jurisdiction can be taken at any time, even up to the time of a trial, and if the foregoing propositions be found not to have been complied with in every particular, the deposition will be thrown out, as in that case the magistrates had no authority at all.

The statutes referred to, and the only statutes upon the subject except such provisions as direct regarding the notifying of parties, summoning of witnesses, the recording and using of the deposition, are Revised Statutes, chap. 94, sect. 34:

"When any person shall be desirous to perpetuate the testimony of any witness, he shall make a statement in writing, setting forth briefly and substantially his title, claim or interest in or to the subject concerning which he desires to perpetuate the evidence, and the names of all other persons interested or supposed to be interested therein, and also the name of the witness proposed to be examined, and shall deliver the said statement to two justices of the peace, one of whom shall be either a judge or register of probate, a clerk of the Supreme Judicial Court, a master in chancery, or a counsellor at law, requesting them to take the deposition of the said witness." And

Statute of 1839, chap. 140, sect. 1:

"If, at the time and place appointed for taking a deposition to perpetuate the testimony of any witness, according to the provisions of the ninety-fourth chapter of the Revised Statutes, the said witness, or any person interested, shall appear and object to the taking of such deposition, the justices, before whom the same is appointed to be taken, shall not proceed to take the same, unless on hearing the parties it shall be made satisfactorily to appear that such testimony may be material to the petitioner, and is not sought for the purpose of discovery, or of using the same in any suit then pending, or thereafter to be brought against said witness, and that the petitioner is in danger of losing the same before it can be taken in any suit, wherein his right, title, interest or claim can be tried; and in all cases, the petitioner, his agent or attorney, shall, at the request of such witness, or any person interested in said deposition, be examined on oath in relation to the reason for taking the same."

But to his Honor's propositions:

1. It is the policy of our law to discover and secure evidence, and to do justice, in all cases, in the quickest, cheapest, and easiest manner possible. For this reason it is, that the greatest facilities are offered and allowed for the taking of depositions of all kinds. The taking of depositions in perpetuam, with us, is purely a matter of statute regulation, and, whatever may be the rule in English Courts of Equity, when we remember that the old statute gave an indiscriminate and unlimited power in the matter, and the new imposes its few, simple, and just restrictions only in the event of objection being made by some party in interest, we think it will be hard to believe that our law does not greatly favor the securing of testimony in that manner. When our statutes, and they are our only guide and only appeal here, allow us almost unbounded license in a particular direction, it will be a somewhat hard matter to persuade us that our going in that direction is not favored. The proposition refers only to the application. We have looked deeper, and considered the whole proceeding. But as to the proposition as it is: The Statute says, "When *any* person shall be desirous to perpetuate the testimony of *any* witness, he shall make a statement in writing," &c. &c. Now, for any one, in the face and eyes of this *any time*, *any person*, and *any witness*, to say that applications are not favored, looks very much to us as if he had interpreted things like Rory's dream, "by conthrarys, my dear." As to the matter of Courts in Equity, we humbly submit that in this State they cannot entertain such a bill at all, nor take the first step towards perpetuating testimony on their own hook. The further matter of not entertaining an application where a suit can be brought, is also settled by statute, which, by section 38 of said 49th chapter, provides that a deposition in perpetuam may be used in any suit then pending, at the very time when the deposition is being taken, between the applicant and the persons named in his written statement. So that such deposition can be taken, not only where a suit can be brought, but where it has been already brought and is then pending.

2. The only knowledge we have that any application at all is necessary, we derive from the Revised Statutes. The only directions we can find, regarding not only the form but the thing itself, are contained in the Revised Statutes. All the provisions of the statute of 1839 are based upon the assumption that the application has been made, the parties notified, the witness summoned, and the time and place of hearing reached, under and according to the provisions of the Revised Statutes alone. Consequently, a man who desires to take a deposition in perpetuam must follow the requirements of the Revised Statutes in making his application, else he can make no application whatever. He has nothing to do with any other statute, unless and until a certain contingency arises, (which may or may not be,) after the witness has appeared to testify. There being no other application known to the law, it necessarily follows that any application good under the Revised Statutes, must be good now. Nay, more, depositions taken under any other, the Courts would be compelled to reject.

3. The matter of taking depositions in perpetuam being purely statu-

tory, the rules of English Courts of Equity have no more to do with it than the English law of primogeniture with the settlement of our estates. It is sometimes amusing to see some of our old lawyers delving for weeks in black letter, to get at the solution of a question which our legislature, had, no doubt very foolishly, solved and settled by statute. We very well remember a certain learned justice, who searched out and brought to bear the whole range of the old common law, upon a question concerning tenancies at will, after the Supreme Court had decided that the common law was not in force in the matter, and the legislature had fixed it by statute. The opinion was very learned, but did not hit the point. English equity rules cannot be suffered to override statute provisions. We might as well contend that those rules should be applied to the taking of all depositions. The fact is, that our statutes favor the taking of depositions, and of the mode of doing it they are the sole directors. Every rule known in equity might be observed, and, after all, if any of the statute provisions are disregarded, the whole proceeding would be worthless. The truth is, that so far from English Equity rules having force in this matter, in order to take a deposition in perpetuam, to be used even in an equity suit, the application must be made under the provisions and warrant of our Revised Statutes, or be of no avail.

4. The application has nothing to do with the statute of 1839, and if no objections are made, the provisions of that statute are not at all called into view. By the very words of that statute, it is only after the preliminaries of application, notification, and summons, have been gone through with according to the provisions of the Revised Statutes, that any inquiry can be raised as to the matter of materiality, discovery, danger, &c., and then only in the event of objection being taken to proceeding by some one interested. Unless the objection is raised, the same broad and unlimited power is open to be exercised as if the Statute of 1839 had never been passed.

5. This proposition, we think, has in fact been already answered. But that its absurdity may more fully appear, we would urge, That as it regards proposition No. 3, it would in a measure presuppose or require that every magistrate in the Commonwealth be thoroughly versed in English equity practice, that he may interpret with sufficient astuteness, a statute which the legislature have endeavored to make so plain that he that runs may read and understand. But how shall the magistrate know that the application sets out all the facts to be proved? Shall they start at a venture? But they have no right to start at all, unless it be so. Or shall they take it for granted and go on, and if on closing up the deposition they happen to light upon something not distinctly set out in the application, shall they put it all in the fire, informing the applicant that they exceeded their power, and he must prick anew? As to proposition No. 4. If magistrates are to be advised beforehand of facts, of which by law they can have no cognizance until afterwards, and perhaps not at all, we think that the possession of the old Scotch faculty of second sight should be made a prerequisite to their being commissioned, unless perchance the employment of a skillful mesmerizer may heal the difficulty.

The magistrates are to see that the application sets forth briefly and substantially a title, claim or interest in or to the subject concerning which the evidence is sought, and purports to contain the names of the witnesses, and of all other persons interested. More would be superfluous. This done, the magistrates under their oath of office must proceed, if required, and if they refuse they do it at their peril.

6. The words of the statutes are not *facts*, but *testimony*, and *evidence*. Any thing may be perpetuated that is testimony, that is evidence, whether it be the opinion of an expert, or the calculation of an accountant. If the deposition must state nothing but absolute facts, according to his Honor's propositions; if it should at any time be discovered, by verdict of jury or otherwise, that something had slipped in which was not a fact; the whole concern would be knocked on the head. It cannot be supposed, that when a party calls a witness he invariably knows beforehand what he will testify, particularly if he be adverse. So far as we can perceive, our statutes make no distinction between the nature and object of testimony, whether *viva voce*, by deposition, or by deposition in perpetuam. In each case, the witness is called to disclose evidence, so that it may be made available to the ends of justice. In each case the party calling supposes he knows that the witness has evidence in his possession material to his case; and it would be preposterous to suppose, that in either or any case the call must be futile, if it so happen that the caller does not know in advance the exact form of that evidence.

Suppose A. knows that B. is in possession of testimony of vital importance to A.'s rights; that B. is about to depart on a dangerous expedition, and is inimical to A., and will not disclose any thing. Shall A. be precluded from perpetuating B.'s testimony, because while he sets out his title, claim or interest therein, and wishes to perpetuate, he also desires to find out the testimony?

A man is always entitled to call for any evidence in possession of a witness which is pertinent to the issue, and if he has any right, title or claim to it, he has a right to search that witness to the full extent of his knowledge; and the witness must, willing or unwilling, disclose all he knows, whether it be things new or old.

We once applied for a habeas corpus, where an attempt was made by deposition in vacation to fish out from a witness the conversation of third persons, to lay the foundation for an action; but the Judge thought it was a matter in the discretion of the magistrate, and advised us to do nothing. The deposition was taken. Under the Revised Statutes, depositions in perpetuam could be taken for any and all purposes, discovery or fishing, and so they can now, if no one interested objects at the time, under the statute of 1839. The word "discovery" in the statute of 1839, we contend means technical discovery, from the position of the word, and its adjuncts in the sentence, and from the very nature of the case. Else a witness could never be searched, material evidence, not absolutely known, could not be obtained, the very policy of the law would be thwarted, and the ends of justice be avoided.

7. The danger should be such as to awaken the solicitude of a prudent man. It need not be extraordinary or imminent. If B. possess evidence of vital importance to A.'s just rights, and that evidence can by no possibility be obtained but from B.; if A. ought justly to have possession of that evidence to protect himself against an attack, that may be delayed and uncertain as to its when, but that cannot be met without that evidence, we think, that in the eye of a prudent man the danger is sufficient to warrant A. in applying to take B.'s deposition in perpetuam. If B. be willing, there will be no difficulty. But if B. be unwilling, that of itself increases the danger, and makes the reason imperative. The question of danger is however one for the magistrates to pass upon, upon the evidence, if it is raised, in the same manner as it is regarding sickness, age, or infirmity, in an ordinary deposition.

8. The proposition, that the statute applies only to the person of the witness, and not to any records or papers in his possession or control, seems to us absurd upon the very face of it; so much so, that there would almost appear to be some untold *cause* for upsetting a deposition, when this is given as a *reason*. The strictest rules of English equity to which such undue deference is paid, if we mistake not, allow the evidence of deeds and muniments of title to be perpetuated, while of no small magnitudes are the masses of documentary facts stored away in the English archives in perpetuity of claims and titles of vast importance. But that is irrelevant. Our statutes relate to testimony, to evidence, and the danger is that of losing the *testimony*, not the testifier merely. The evidence may be of such a nature, that the presence of the witness might not be worth a straw without the documents. He may be merely their custodian, and it may be necessary to call him to produce papers, and afterwards to call another to verify them (unless it be said, perhaps, that the fact that the custodian could not verify, being found out, would be such a discovery as to vitiate the whole proceeding!) There may be no danger of the witness being absent; but there may be the most imminent danger that the documents be lost or destroyed, and this fact be capable of undoubted proof. Shall it be said, then, that the facts in those documents cannot be perpetuated? Shall a *subpœna duces* operate every where but here; and here, where so important, utterly fail?

9. What the word discretion means in this connection, it is hard to say. Wherever there is latitude or margin allowed, it seems to us discretion is to be exercised. If no objections are made, the magistrates certainly can take any thing they please as a deposition in perpetuam; and, under the Revised Statutes, the only question would seem to be, whether their discretion was unlimited, or whether they were not obliged to take any thing whether or no, without discretion. One magistrate might decide that a man of fifty was so aged that it was probable he would not be able to attend the trial of a case, and so take his deposition. Another might refuse on the ground the man was not aged enough. Now, if this be not exercising a discretion regarding a matter of positive law, we cannot designate it at all. From those contrary decisions there

could be no appeal. So, as it regards the danger of losing testimony desired to be perpetuated, the magistrates must decide in the exercise of a sound discretion, and although two sets of magistrates may perchance decide differently as to the same matter, we are not aware that fact would vitiate the acts of either. Poor debtors frequently follow round the quorum to find the desired discretion, and though the law is peremptory, yet the discretion varies. If, after the legal objections are raised under the statute of 1839, regarding depositions in perpetuam, the magistrates are satisfied, from the evidence, that the petitioner is right, they are bound to proceed. The sufficiency of the evidence is for them to pass upon, and their decisions, as the decisions of any magistrate honestly made regarding matters within the scope of his authority and jurisdiction, should be attacked only upon the gravest considerations, and for the weightiest reasons, and, it would seem, only to prevent a positive wrong.

10. Objection to the jurisdiction, we know, can be made at any time; but if the propositions we have been considering are correct, we venture to say, there has hardly been a deposition in perpetuam taken since 1839 which will stand the test. Let us suppose a case.

X. Y. threatens to sue me upon a contract, and to recover heavy damages, at some time, for which he is on the watch. A. B. is in possession of a certain paper, the precise nature of which I do not know, which will furnish for me a perfect defence. A. B. is inimical to me, and refuses me the paper, or even a copy. I make application, under the provisions of the Revised Statutes, to two proper magistrates, stating that there is a question or cause of action in assumpsit, or case, or as may be, upon a contract, in which I am liable to be called to answer as defendant; that I wish to perpetuate the testimony of A. B. regarding the same, and more particularly I wish to perpetuate the evidence contained in a paper writing in said A. B.'s possession, relating to said cause of action, and that the only other person interested is X. Y. The magistrates accordingly notify X. Y., and summon A. B., directing him to bring said paper and all papers he may have relating to the matter. A. B. appears, and objects to the deposition being taken under the statute of 1839, and requires that I be personally examined. The magistrates proceed to consider the facts in the case, and under the positive evidence before them, uncontradicted by the witness, are fully satisfied that the evidence is material to me; that I do not seek it for the purpose of discovery, or to use it against the witness, and that I am in danger of losing the same before, &c.; the peculiar danger being of the loss of the said paper, rather than the person of A. B. The magistrates require the witness to testify and to produce the paper, and the deposition is taken and recorded. Years after, A. B. having died or gone away, and the paper being destroyed, X. Y. brings his action. At the trial, I triumphantly produce A. B.'s deposition; but X. Y. objects that the deposition cannot be received, that the magistrates had no jurisdiction and no right to summon A. B. at all. Because, 1. The statute deals with persons, not with documents, so far at any rate as the question of danger is concerned, and

in this case there seems to have been no danger of losing the witness at that time. 2. The application did not set forth the precise nature of the paper sought for. 3. The application did not set out all the provisions of the statute of 1839. 4. The petitioner had evidently found out something of which he was not precisely advised beforehand, and seemed to have expected so to do, so that although he did desire to perpetuate the testimony, he also wished to know what it was. This is taking a man by surprise to be sure; but there is no remedy if the propositions we have considered are correct. The deposition must be set aside, and the real ends of justice be defeated. — E.

Counterfeit Coin. — The United States Supreme Court have decided a case involving the power of Congress to pass laws to prohibit the circulation of counterfeit coin, and punish the person circulating it. The case came up before the Supreme Court of New York. The case was argued before the Supreme Court by Mr. Johnson, the Attorney General, in favor of the power of Congress in the matter, and Mr. Seward against it. The decision of the Court was in favor of the power, and thus established the full authority of Congress over the whole question.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Adden, John Jr.	Reading,	July 8,	Asa F. Lawrence.
Babbitt, Sewell	Barre,	" 16,	Henry Chapin.
Bates, Noah	Templeton,	" 19,	Henry Chapin.
Bowman, Charles C. et al.	Boston,	" 29,	John M. Williams.
Boardman, William W.	Lowell,	" 2,	Asa F. Lawrence.
Brown, Edward F.	Boston,	" 25,	John M. Williams.
Brown, Henry A.	Needham,	" 22,	Francis Hilliard
Clemons, Robert M.	Andover,	" 25,	John G. King.
Darling, David	Attleboro'	" 25,	David Perkins.
Drew, Rufus W. et al.	New Bedford,	" 6,	David Perkins.
Ferrin, Gilbert	Lowell,	" 27,	Asa F. Lawrence.
Ferry, Joseph	Springfield,	" 27,	George B. Morris.
Fose, Timothy	Lawrence,	" 3,	John G. King.
Fuller, Pulaski W.	Leominster,	" 3,	Henry Chapin.
Hervey, George M.	Oxford,	" 2,	Henry Chapin.
Higgins, Azuba	Stoughton,	" 19,	Francis Hilliard.
Hubbard, William W.	Boston,	" 3,	John M. Williams.
Kilbourne, Augustus	Boston,	" 2,	John M. Williams.
King, Edward	Pittsfield,	" 25,	Thomas Robinson.
Lawrence, George D.	Boston,	" 20,	John M. Williams.
McElvain, William	Palmer,	" 12,	George B. Morris.
Parker, James S. et al.	Plymouth,	" 22,	Welcome Young.
Pattee, Asa D.	Charlestown,	" 12,	Asa F. Lawrence.
Pond, Hollis	Wrentham,	" 2,	Francis Hilliard.
Russ, John	Lowell,	" 15,	Asa F. Lawrence.
Shattuck, James M.	Williamstown,	" 31,	T. Robinson.
Shepard, James H.	Boston,	" 20,	John M. Williams
Smith, Edward T.	Templeton,	" 13,	Henry Chapin.
Sproul, Francis	Cambridge,	" 9,	Asa F. Lawrence.
Starr, William H.	Lynn,	" 18,	I. G. King
Stevens, William L.	Holyoke,	" 2,	George B. Morris.
Stratton, Wright	Northfield,	" 16,	D. W. Alvord.
Whalley, Frederick S.	Roxbury,	" 16,	F. Hilliard.
Whittaker, Jonathan	New Salem,	" 10,	D. W. Alvord.
Wilbur, Marshall	Fairhaven,	" 3,	David Perkins.
Wyman, Sumner	Winchendon,	" 3,	Henry Chapin.